

Supreme Court, U.S.
FILED

126 ① 081267 FEB 13 2009

NO. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Bertha M. Garrett-Woodberry,
Petitioner,

v.

Mississippi Board of Pharmacy, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert Nicholas Norris
Louis H. Watson, Jr.
(Counsel of Record)
Louis H. Watson, Jr., P.A.
520 East Capitol Street
Jackson, MS 39201
(601) 968-0000

February 12, 2009

QUESTION PRESENTED

What test should be applied in Title VII cases involving governmental entities to determine whether the state governmental entities can be aggregated into a "single employer" to meet the "employer" definition under 42 U.S.C. § 2000e(b).

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
I. The Court of Appeals are Intractably Divided over the Question Presented.	4
II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.	5
III. The Fifth Circuit's Decision Will Seriously Impede the Administration of Title VII....	7

CONCLUSION.....	10
-----------------	----

TABLE OF AUTHORITIES

Cases

<i>Artis v. Francis Howell N. Band Ass'n,</i>	
161 F.3d 1178 (8th Cir. 1998)	4
<i>Baker v. Stuart Broad. Co.,</i>	
560 F.2d 389, 391 (8th Cir. 1977)	8
<i>Bristol v. Board of County Comm'rs of the County of Clear Creek,</i>	
312 F.3d 1213, 1220 (10th Cir. 2002)	5
<i>Carter v. Mississippi Dept. of Human Services,</i>	
2006 WL 2827691 *1 (S.D. Miss. 2006)	7
<i>Dumas v. Town of Mount Vernon, Alabama,</i>	
612 F.2d 974 (5th Cir. 1980)	3
<i>Gulino v. New York State Educ. Dept.,</i>	
460 F.3d 361 (2d Cir. 2006)	5
<i>Karagounis v. Univ. of Tex. Health Sci. Ctr. at San Antonio,</i>	
168 F.3d 485 (5th Cir. 1999)	3
<i>Laurie v. Alabama Court of Crim. Apps.,</i>	
256 F.3d 1266 (11th Cir. 2001)	5, 9
<i>Lusk v. Foxmeyer Health Corp.,</i>	
129 F.3d 773, 777 n.3 (5th Cir. 1997)	8
<i>Perez v. Region 20 Education Services Center,</i>	
307 F. 3d 318, 326 (5th Cir. 2002)	7
<i>Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.,</i>	
380 U.S. 255, 85 S. Ct. 876, 13L.Ed. 2d 789 (1965)	4, 8

<i>Torres-Negron v. Merck & Co., Inc.</i> ,	
488 F.3d 34, 42 n.7 (1st Cir. 2007)	9
<i>Trevino v. Celanese Corp.</i> ,	
701 F.2d 397 (5th Cir. 1983)	3, 4, 5
<i>Turner v. Baylor Richardson Med. Ctr.</i> ,	
476 F.3d 337 (5th Cir. 2007)	5
<i>Twelde v. Albright</i> ,	
89 F. Supp. 2d 12, 16 n.7 (D.D.C. 2000)	5

Statutes

28 U.S.C. 1254(1)	1
29 C.F.R. § 553.102 (b).....	9
29 C.F.R. § 553.102(b).....	4
42 U.S.C. § 2000e(a).....	2
42 U.S.C. § 2000e(b).....	1
42 U.S.C. § 2000e-2(a)	3
Miss. Code Ann. § 25-9-105	7
Miss. Code Ann. § 25-9-131 (1).....	7
Miss. Code Ann. § 27-104-13	7

Other Authorities

Bureau of the Census	6
Fair Labor Standards Act.....	9
H.R. Rep. No. 92-238	6
Pub. L. 92-261§2(2)	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bertha M. Garrett-Woodberry, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-5a) is unpublished. The district court's order granting summary judgment in favor of respondent (Pet. App. 6a-13a), dated March 27, 2008 is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2008. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

§ 701(b) of Title VII of the Civil Rights Act of 1964 defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year..." 42 U.S.C. § 2000e(b).

§ 701(a) of Title VII of the Civil Rights Act of 1964 defines "person" as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations,

trustees, trustees in cases under Title 11, or receivers." 42 U.S.C. § 2000e(a).

STATEMENT

Petitioner alleges that respondent violated Title VII of the Civil Rights Act of 1964 by denying her the same opportunities as respondent's male employees by forcing her to take a job in another division or be demoted and take a pay cut while male employees were not forced to take an alternate job, were not demoted nor forced to take a pay cut. Petitioner also alleges that respondent violated Title VII by denying her the same opportunities as respondent's white employees by not allowing her to work in the field while the white employees are allowed to work in the field.

1. Ms. Garrett-Woodberry filed her charge of discrimination against the Mississippi Board of Pharmacy with the Equal Employment Opportunity Commission on July 24, 2006, alleging race and sex discrimination. She was issued a Notice of Right to Sue letter by the Equal Employment Opportunity Commission on August 31, 2006, and proceeded to file her Complaint against the respondent on November 29, 2006, in the Circuit Court for the First Judicial District of Hinds County, Mississippi. Petitioner filed her First Amended Complaint on December 16, 2006.

2. In her Complaint, petitioner alleged claims of race discrimination, sex discrimination, and retaliation, pursuant to Title VII of the Civil

Rights Act of 1964, and 42 U.S.C. §§ 1981 and 1983. The respondent consented to the jurisdiction of and removed the current case to the United States District Court for the Southern District of Mississippi, Jackson Division on January 4, 2007. On January 8, 2007, respondent filed its Answer wherein its fourth defense, the respondent plead it was not an employer under 42 U.S.C. § 2000e-2(a) as it does not employ 15 or more employees. On January 16, 2008, after the close of discovery, respondent filed its Motion for Summary Judgment. The district court granted the respondent's motion on March 27, 2008, stating that although the "single employer" test found in *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983), is often utilized "it has no application in the context of this case" because the respondent is a state agency. As the district court pointed out, the foundation for this judgment are two Fifth Circuit cases, *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (5th Cir. 1980), and *Karagounis v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 168 F.3d 485 (5th Cir. 1999), that dealt with political subdivision and yet the circuit court analogized it to a state agency for this case.

3. On April 23, 2008, the petitioner appealed the district courts opinion to the United States Court of Appeals for the Fifth Circuit. On November 20, 2008, the Fifth Circuit affirmed the district court's opinion that the state agencies of the State of Mississippi

should not be aggregated under the “single employer” test of *Trevino* because state agencies are governmental subdivisions. However, the Fifth Circuit did not consider Petitioner’s alternative suggestion of adopting the Eleventh Circuit’s analysis for governmental agencies or the Fair Labor Standards Act’s approach of using the Bureau of the Census statistics. 29 C.F.R. § 553.102(b).

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are divided over what test, if any, is to be used to determine if multiple state governmental entities may be aggregated into a “single employer.” Given the importance of the administration of Title VII, such a conflict is untenable. This case presents such a vitally important question and thus is an ideal case in which to resolve the question. Finally, the Fifth Circuit decision will seriously impede the administration of Title VII. Certiorari should be granted.

I. The Court of Appeals are Intractably Divided over the Question Presented.

Three circuits—the Eighth, Tenth, and D.C.—have applied the “single employer” theory introduced by this Court in *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S. Ct. 876, 13L.Ed. 2d 789 (1965), to public entities. See e.g., *Artis v. Francis Howell N. Band Ass’n*, 161 F.3d 1178 (8th Cir. 1998); *Bristol v. Board of*

County Comm'rs of the County of Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002); *Twelde v. Albright*, 89 F. Supp. 2d 12, 16 n.7 (D.D.C. 2000).

In contrast, two circuits—the Second and Fifth—decline to apply the “single employer” test to governmental entities in the Title VII context. See e.g. *Gulino v. New York State Educ. Dept.*, 460 F.3d 361 (2d Cir. 2006); *Trevino v. Celanese Corp*, 701 F.2d 397 (5th Cir. 1983); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337 (5th Cir. 2007). The Eleventh Circuit follows the Fifth Circuit in presuming that the “single employer” test is not applicable to governmental entities in Title VII cases, but it is a rebuttable presumption that plaintiffs may overcome. See *Laurie v. Alabama Court of Crim. Apps.*, 256 F.3d 1266 (11th Cir. 2001).

II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.

The circuit conflict is untenable because it does not afford equal protection among the circuits. Currently, discriminated employees in all circuits are not equally protected under Title VII because some circuits are aggregating governmental entities while other circuits are not.

According to the March 2007 census from the Bureau of the Census, State governmental agencies employ an estimated 3.7 million full-time employees and 1.4 million part-time

employees. *See State Government Employment Payroll at* <http://ftp2.census.gov/govs/apes/07stall.xls> (Last visited January 29, 2009). While not all agencies will need to be aggregated in order to satisfy the fifteen (15) employee requirement, if there is no test for aggregation, there are potentially millions of employees that have no remedy when they are subjected to discrimination and that is surely not the intention of Congress.

In 1972, Congress amended § 701 (b) of Title VII of the Civil Rights Act of 1964. Pub. L. 92-261§2(2). The amendment to § 701 (b) extended coverage of Title VII to state and local government. The legislative history of the amendment states, “it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time, denying a similar protection to the increasing number of state and local employees.” H.R. Rep. No. 92-238, reprinted in 1972 U.S.C.C.A.N. 2137, 2153-4. Furthermore, Congress reduced the number of employees required from 25 to 15 because “discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers.” *Id.* at 2155.

Additionally, there is disjointedness as to when the agencies of state government are aggregated. In Mississippi, state statutes call for the integration of the state agencies. *See*

Miss. Code § 25-9-105; Miss. Code Ann. § 25-9-131 (1); Miss. Code Ann. § 27-104-13. The courts have also consistently treated state agencies as one employer, particularly when applying Eleventh Amendment immunity. Even though the United States Constitution makes no mention of providing state sovereign immunity to state agencies, courts has consistently done so. *See Carter v. Mississippi Dept. of Human Services*, 2006 WL 2827691 *1 (S.D. Miss. 2006); *Perez v. Region 20 Education Services Center*, 307 F. 3d 318, 326 (5th Cir. 2002). If the courts consider state agencies to be integrated and one entity for Eleventh Amendment sovereign immunity purposes, the same agencies should be integrated and aggregated for employment disputes.

This is an important question of national policy. Clear tests and guidelines are needed from this Court in order to promote Title VII.

III. The Fifth Circuit's Decision Will Seriously Impede the Administration of Title VII.

If the decision of the Fifth Circuit is allowed to stand, the administration of Title VII will be seriously impeded. Congress enacted Title VII in 1964 with the goal of eliminating employment discrimination. As discussed above, the purpose for requiring 15 employees instead of 25 was to extend Title VII protection to all segments of the work force. To now say that state governmental entities cannot be

aggregated under test because they are government subdivision is arbitrary.

There is no logical reason not to allow the courts to aggregate governmental state entities for the 15 employee requirement. The single employer theory was introduced in 1964 in *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S. Ct. 876, 13L.Ed. 2d 789 (1965). The case was between two private entities, but the reasoning behind the theory is just as applicable to public entities. And as it was a test created by the judiciary, it can and should be expanded by this Court. The court in *Torres-Negron v. Merck & Co., Inc.*, 488 F.3d 34, 42 n.7 (1st Cir. 2007), said “the very purpose of the doctrine [of “single employer”] is to extend responsibility for discrimination beyond technical distinctions to promote the Title VII goal of eliminating employment discrimination.” See *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 n.3 (5th Cir. 1997) (citing *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir. 1977)). If there is no aggregation of state governmental entities in the Fifth Circuit, there is an avenue for state governments to circumvent any Title VII discrimination claims simply by restructuring the agencies. While it has not been alleged in this case, states should not be allowed that avenue to avoid Title VII.

The Fifth Circuit’s decision not to apply the “single employer” theory to government subdivisions because the National Labor

Relations Board's test does not adequately apply to government subdivisions may be valid; however, to proactively avoid purposeful restructuring, courts should be given a test or theory that would be applicable much like the Eleventh Circuit has already accomplished.

The Eleventh Circuit has held that it is a presumption that single employer aggregation is not applicable to governmental entities. The presumption is rebuttable by showing either that: (1) the state's purpose for separating the entities under state law was to evade federal employment discrimination laws, or (2) the entities are so closely related with respect to control of the fundamental aspects of the employment relationship that they should be treated as a single employer. *See Laurie v. Alabama Court of Crim. Apps.*, 256 F.3d 1266 (11th Cir. 2001).

Alternatively, governmental agencies could be aggregated under the Fair Labor Standards Act ("FLSA") approach of:

One factor that would support such a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

29 C.F.R. § 553.102 (b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Nicholas Norris
Louis H. Watson, Jr.
LOUIS H. WATSON, JR., P.A.
520 E. Capitol Street
Jackson, Mississippi 39201
(601) 968-0000

February 12, 2009

APPENDICES

IN THE UNITED STATES COURT OF
APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60372
Summary Calendar

BERTHA M. GARRETT-WOODBERRY,
Plaintiff-
Appellant,
v.

MISSISSIPPI BOARD OF PHARMACY,
Defendant-
Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:07-cv-00004

Date: November 20, 2008.

Before JOLLY, BENAVIDES, and HAYNES,
Circuit Judges.

PER CURIAM:

Appellant Bertha M. Garrett-Woodberry appeals the district court's grant of summary judgment in favor of Appellee Mississippi Board of Pharmacy. The court held that the Board did not employ enough workers to satisfy the statutory minimum for "employer" status under Title VII. For the following reasons, we AFFIRM.

I.

Appellant Woodberry began her nine-year period of employment with the Mississippi Board of Pharmacy (the "Board") in 1999 as an administrative assistant and was promoted to her current position as an enforcement agent in 2004. In September 2006, the Board issued a directive assigning Woodberry to the licensing division of the Board. Woodberry filed suit against the Board on November 29, 2006, in Mississippi state court, alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, sex discrimination under Title VII, and various state law claims. The Board removed the case to the federal district court. After the close of the discovery period, the Board moved for summary judgment on all counts. Woodberry conceded all of her claims except those based on Title VII and

the state whistleblower statute. On March 27, 2008, the trial court issued its opinion and order granting the Board's motion and dismissing Woodberry's claims based upon Title VII with prejudice. Woodberry appeals the court's dismissal of her Title VII claims.

II.

A grant of summary judgment is reviewed *de novo*. *Celestine v. Petroleos De Venezuela SA*, 266 F.3d 343, 349 (5th Cir. 2001). The party seeking summary judgment is required to demonstrate that there is an absence of evidence to support the nonmoving party's case. *Id.* (citing *Celotex v. Catrett*, 477 U.S. 317, 325 (1986)). To survive a proper motion for summary judgment, the nonmovant must "bring forward sufficient evidence to demonstrate that a genuine issue of material fact exists for every element of a claim." *Celestine*, 266 F.3d at 349. For summary judgment purposes, all evidence produced by the nonmovant is taken as true and all inferences are drawn in the nonmovant's favor. *Id.*

Title VII prohibits discrimination by an "employer" based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year." 42 U.S.C. § 2000e(b). There is no dispute that the Board, standing alone, lacks a sufficient number of employees to constitute a

statutory "employer" under Title VII. Nor is there any dispute that the Board was established by statute as a state agency. The sole question is whether the court should aggregate the Board's employees with those of other state agencies. Appellant contends that the district court erred in holding that the Board should not be aggregated with other state agencies under the "single employer test."

In *Trevino v. Celanese Corp.*, this Circuit iterated a "single employer" test to determine when two private entities should be aggregated for the purposes of determining whether they constitute an employer under Title VII. 701 F.2d 397 (5th Cir. 1983). The four-part *Trevino* test involves consideration of (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. 701 F.2d at 404. The second factor of this inquiry is deemed the most important. *Id.* The *Trevino* court noted that we have declined to apply this "single employer" test to governmental subdivisions because it was developed for application to private entities. *Trevino*, 701 F.2d at 404 n.10; *see also Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 (5th Cir. 2007) (noting that aggregation is not applicable to governmental subdivisions in the context of Title VII); *Karagounis v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 1999 WL 25015, *2 (5th Cir. Jan. 5, 1999) (refusing to aggregate

the employees of a governmental subdivision in the context of Title VII); *Dumas v. Town of Mount Vernon, Al.*, 612 F.2d 974, 980 n.9 (5th Cir. 1980) (declining to apply the test with regard to the employees of a town, state, and county). Thus, it seems clear that the "single employer" test should not be applied here, as the Board is a state agency and is thus a governmental subdivision.

Moreover, even if we were to apply the "single employer" test in this instance, the district court correctly held that Woodberry did not provide any evidence sufficient to support aggregation under the test. Woodberry seeks to aggregate all of the state agencies of the State of Mississippi as one single employer, but put forth no evidence that the State made any decision or took any action regarding her employment. Woodberry failed to provide evidence in opposition to the Board's motion that supported the most crucial factor of the "single employer" test—that the State and the Board shared centralized control of labor relations.¹ In addition, as noted by the district court, the record evidence demonstrates that the Board makes autonomous decisions concerning

¹ Appellant submitted new evidence in her brief. Because "our review is confined to an examination of materials before the lower court at the time the ruling was made," this evidence was not considered. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988).

its employees, including hiring, transfers, promotions, discipline, and discharges.

Accordingly, we find that the district court properly determined that the Board did not satisfy the statutory definition of "employer" under Title VII. The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BERTHA M. GARRETT-WOODBERRY
PLAINTIFF

v. CIVIL ACTION NO. 3:07cv4 DPJ-
JCS

MISSISSIPPI BOARD OF PHARMACY ET
AL.

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This employment discrimination case is before the Court on the motion of Defendants Mississippi Board of Pharmacy, Leland McDivitt, and Frank Gammill for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has responded in opposition, conceding her claims against McDivitt and Gammill, her claims under 42 U.S.C. § 1981 and § 1983, her claims for intentional and negligent infliction of emotional distress, and her claim for punitive damages. The only remaining claims are those under Title VII and the Mississippi Whistleblower Act. Having considered the memoranda and

submissions of the parties, along with the pertinent authorities, the Court finds that Defendants' motion for summary judgment on the Title VII claims should be granted, and Plaintiff's state law whistleblower claim should be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3) (2006).

I. Facts

Plaintiff Bertha M. Garrett-Woodberry ("Woodberry") began her employment with the Mississippi State Board of Pharmacy ("Board") in 1999. The Board was established by statute as a state agency, and there is no dispute that at all time periods relevant to this suit, it employed less than fifteen employees. The salient issue before the Court is whether the Board employs enough workers to satisfy the statutory minimum for "employer" status under Title VII.

II. Analysis

Summary judgment is warranted under Rule 56(c) of the Federal Rules of Civil Procedure when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A. Title VII Claims

Title VII of the Civil Rights Act of 1964 prohibits discrimination by an "employer" on the basis of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a) (2003). Title VII defines an "employer" as "a person engaged in an industry affecting commerce *who has fifteen or more employees* for each working day in each of twenty or more calendar weeks in the current or preceding year." *Id.* § 2000e (emphasis added). A "person" is defined as including "one or more individuals, governments, governmental agencies, [and] political subdivisions." *Id.* There is no dispute that the Board, standing alone, lacks sufficient numbers to constitute a statutory "employer" under Title VII. The question is whether the Court should aggregate the Board's employees with those of all other state agencies.

In their arguments regarding aggregation, both Plaintiff and Defendants apply variations of the "single employer" test found in *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). The four-part *Trevino* test involves consideration of (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or

financial control. 701 F.2d at 404. The critical question is “what entity made the final decisions regarding the employment matters related to the person claiming discrimination?” *Id.*

Although the Fifth Circuit Court of Appeals often utilizes this test to determine whether an employer meets Title VII’s fifteen-employee threshold requirement, *see, e.g., Guillory v. Rainbow Chrysler Dodge Jeep, LLC*, 158 F. App’x 536, 537–38 (5th Cir. 2005), the Court finds that it has no application in the context of this case.

In *Dumas v. Town of Mount Vernon, Alabama*, the Fifth Circuit Court of Appeals declined to apply the “single employer” theory to governmental subdivisions. 612 F.2d 974, 980 n.9 (5th Cir. 1980). This ruling was later explained in *Trevino*:

Although we declined to apply the integrated enterprise standard in *Dumas* . . . , that case is readily distinguishable on its facts.

Plaintiffs in *Dumas* sought under the four-part standard to integrate the Town of Mt. Vernon with either the county, or the state. As articulated, the standard is not readily applicable to governmental subdivisions, for it was developed by the National Labor Relations Board

to determine whether consolidation of separate *private* corporations is proper in determining the relevant employer for purposes of enforcing the National Labor Relations Act.

701 F.2d at 404 n.10 (internal quotations and citation omitted). A subsequent per curiam opinion

from the Fifth Circuit held that the reasoning for the *Dumas* "governmental subdivision" caveat to the "single employer" doctrine applied with equal force to the "joint employer" theory because the "core analysis of these two inquires are virtually identical." *Karagounis v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 168 F.3d 485, 1999 WL 25015, at *2 (5th Cir. 1999) (unpublished table decision).

Although *Dumas* and *Karagounis* dealt with political subdivisions, whereas the Board is a state agency, the cases are analogous. First, as noted in *Trevino*, the test developed by the National Labor Relations Board to determine whether employees of private corporations should be consolidated is not readily applicable to political subdivisions. 701 F.2d at 404 n.10. State agencies, which operate by statute within their respective areas of responsibility, are equally dissimilar and are not susceptible to the same policy considerations as private corporations.

Second, *Dumas* and *Karagounis* looked beyond the state/political subdivision level. In *Dumas*, the Fifth Circuit refused to apply a “single employer” analysis to aggregate the employees of the town of Mount Vernon, the state of Alabama, the county’s personnel board, “or all three.” 612 F.2d at 980 n.9. In *Karagounis*, the court refused to engage in a “single employer” or “joint employer” analysis as between the University of Texas Health Science Center at San Antonio and the Bexar County Hospital District d/b/a/ University Hospital. In other words, *Dumas* and *Karagounis* apply not only to the vertical relationship between the state and its political subdivisions, but also to the relationships between the other governmental entities in those cases.

Finally, the Fifth Circuit used more general language regarding the governmental subdivision caveat in *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337 (5th Cir. 2007). In that case, the court contemplated whether a non-profit, fund-raising corporation should be considered as an integrated entity with a governmental hospital authority. Although the court examined the *Trevino* test and found no integrated entity, it further observed, “[O]ur prior case law suggests that a government employer, such as RHA, may not be considered part of an integrated enterprise

under the *Trevino* framework." 476 F.3d at 344. Accordingly, this Court finds that the single/integrated and joint employer aggregation theories are not applicable to the present case.

Even assuming that *Trevino* should apply to these governmental entities, the result would be no different. First, there is no interrelation of operations. *Trevino*, 701 F.2d at 404. The record evidence demonstrates that the Board makes autonomous decisions concerning its employees, including hiring, transfers, promotions, discipline, and discharges. The Board maintains the personnel records on its employees, including leave requests and time records. And, by statute, no other agency performs the Board's function. In these regards, the evidence demonstrates a lack of interrelation of operations. See *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) (noting in the corporate context that "[a]ttention to detail, not general oversight, is the hallmark of interrelated operations") (citations and internal quotations omitted).

Second, there is no proof of centralized control of labor relations. *Trevino*, 701 F.2d at 404. This is the key question, *id.*, and the record evidence reflects that the Board unilaterally made all relevant decisions with respect to Plaintiff's employment. Plaintiff contests this point, noting that she filed grievances with the

State Personnel Board.¹ Plaintiff's grievances do not equate to centralized control of labor relations. Plaintiff filed complaints with many state and federal entities. And, significantly, Plaintiff has not directed the Court's attention to any evidence suggesting that the State Personnel Board actually made any of the Board's labor decisions, including the disputed decisions regarding Plaintiff's employment. *Cf. Johnson v.*

Crown Enters., Inc., 398 F.3d 339, 344 (5th Cir. 2005); *see also Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir. 1999); *Martin v. Maselle & Assocs., Inc.*, No.

Finally, issues of common management, ownership, or financial control do not tip the scales in favor of aggregation. *Trevino*, 701 F.2d at 404. The Court rejects Plaintiff's argument that the Board's enacting statutes establish single or joint employer status. Plaintiff's arguments are akin to those regarding common ownership or management in the private sector.²

¹ In *Dumas*, the plaintiff sued both the city that refused to hire her and the county's personnel board, which screened applicants for the city and made hiring recommendations. 612 F.2d at 976. Although the court reversed an order dismissing Title VII claims against the county personnel board, it nonetheless refused to aggregate employees of the city and employees of the county to meet Title VII's fifteen-employee minimum. *Id.* at 980.

² Admittedly, this analysis is strained. As the Fifth Circuit observed in *Trevino*, the single/integrated employer test was designed for the private,

Here, the Board prepares its own budget, operates its own budget, maintains a separate bank account, and operates without assistance from the state on funds the Board collects in the form of fees, licenses, and fines. Still, even assuming common ownership or management, the mere existence of such facts does not, without more, justify aggregation. *Lusk*, 129 F.3d at 778.

In sum, the Board controlled every aspect of Plaintiff's employment, and its employees should not be aggregated with other state employees for purposes of meeting Title VII's fifteen employee jurisdictional requirement. Consequently, the Board does not constitute an employer under Title VII, and Defendants' motion for summary judgment is granted as to Plaintiff's Title VII claims.

B. Mississippi Whistleblower Act Claim

Plaintiff's remaining claim is brought pursuant to state law. A district court may decline to exercise supplemental jurisdiction over a claim if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1337(c)(3). Having done so, this Court finds that the state law claim should be dismissed in light

corporate context; thus, its application to governmental entities is imprecise.

of judicial economy, convenience, fairness, and comity. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (cited in *Parker & Parsley Petro. Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992)). Plaintiff's remaining cause of action is premised on a Mississippi statute, the relevant portions of which have not been explored by Mississippi courts. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* Accordingly, Plaintiff's state law claim for violation of the Mississippi Whistleblower Act is dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

III. Conclusion

The Court has considered and rejected the remaining arguments raised in the parties' submissions. Accordingly, for the reasons stated herein, the Court grants Defendants' motion for summary judgment as to all of Plaintiff's claims except her Mississippi Whistleblower Act claim, which is dismissed without prejudice pursuant to 28 U.S.C. §1367(c)(3).

SO ORDERED AND ADJUDGED this the 27th day of March, 2008.

s/ Daniel P. Jordan III

UNITED STATES DISTRICT
JUDGE